

BEFORE THE  
POLLUTION CONTROL HEARINGS BOARD  
STATE OF WASHINGTON

IN THE MATTER OF  
KAISER ALUMINUM AND CHEMICAL  
CORPORATION,

Appellant,

v.

PUGET SOUND AIR POLLUTION  
CONTROL AGENCY,

Respondent.

PCHB No. 78-114

FINAL FINDINGS OF FACT,  
CONCLUSIONS OF LAW  
AND ORDER

This matter, the appeal of a \$250 civil penalty for the alleged violation of Section 9.11(a) of respondent's Regulation I, came before the Pollution Control Hearings Board, Dave J. Mooney, Chairman, Chris Smith, and David Akana (presiding) at a formal hearing in Tacoma on July 24, 1978.

Appellant was represented by its attorney, John P. O'Connor; respondent was represented by its attorney, Keith D. McGoffin.

Having heard the testimony, having examined the exhibits, and having considered the contentions of the parties, the Board

1 makes these

2 FINDINGS OF FACT

3 I

4 Pursuant to RCW 43.21B.260, respondent has filed with this  
5 Board a certified copy of its Regulation I and amendments thereto  
6 which are noticed.

7 II

8 Appellant owns and operates a certain alumina loading  
9 facility at its location at Pier #7, Port of Tacoma in Tacoma,  
10 Washington. Alumina is moved from storage domes through a system  
11 of chutes and conveyors into waiting railroad cars. One operator  
12 oversees the loading of the railroad cars.

13 III

14 Complainants are employees of Totem Ocean Trailer Express, Inc.  
15 (TOTE), which maintains an office at 1002 Port of Tacoma Road in Tacoma.  
16 The office, which is a converted mobile home, is located about 60 feet  
17 from the loading facility. TOTE employees park their cars in a lot about  
18 90 feet from the loading facility.

19 IV

20 On March 21, 1978 at about 11:00 a.m. in response to  
21 complaints of airborne particulate matter from employees of TOTE,  
22 respondent's inspector arrived at TOTE's office. He did not  
23 observe any significant emission from appellant's facility  
24 during his visit. After conversing with a TOTE employee, the  
25 inspector left the site and returned later in the afternoon with  
26 formal complaint forms for distribution to the complainants.

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1 Appellant's Service Superintendent was informed of possible  
2 notices of violation if formal complaints were filed. Based  
3 upon the formal complaints filed, nine notices of violation were  
4 issued for alleged violations of Section 9.11(a) of respondent's  
5 Regulation I from which followed a \$250 civil penalty and the  
6 instant appeal.

7 V

8 Complainants each reported some of the following occurrences  
9 on March 21: Whitish-gray dust, from the rail cars and chute  
10 leading to the hopper of appellant's facility, blowing in the air  
11 toward the TOTE office; dust in complainant's air conditioning  
12 system and in the office; eye irritations from the dust lasting for  
13 varying periods of time; skin irritations and allergic reactions  
14 from the dust. Although the physical reactions reported are  
15 disputed by appellant, we find such reactions to have occurred.  
16 In addition to the above occurrences, complainants testified to  
17 the presence of whitish-gray dust on their cars. Because of the  
18 ever-present dust, complainants' cars are subject to severe  
19 conditions requiring frequent maintenance and cleaning. In tests conducted  
20 at respondent's laboratory, dust from appellant's loading facility was  
21 physically indistinguishable from that found on the complainants' cars.

22 VI

23 The dust caused physical irritations to complainants and  
24 necessitated some time off to wash their eyes and faces. The dust  
25 constituted an unreasonable detriment to complainants' physical well-being  
26 and to their property.

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VII

Appellant acknowledges a continuous "minor" amount of dust from its facility. The dust escapes in spite of the dust collector system installed, the seals over the railroad car opening and the vacuum system. Over the years appellant has spent about \$150,000 to reduce its pollution at the facility. However on March 21, appellant's conveying system experienced a defective brush which could have caused the dust reported by TOTE employees.

VIII

Alumina, the material handled by appellant, is a high grade aluminium oxide which is chemically inert although physically abrasive.

IX

Any Conclusion of Law which should be deemed a Finding of Fact is hereby adopted as such.

From these Findings, the Board makes these

CONCLUSIONS OF LAW

I

Section 9.11(a) of Regulation I provides that:

It shall be unlawful for any person to cause or permit the emission of an air contaminant or water vapor, including an air contaminant whose emission is not otherwise prohibited by this Regulation, if the air contaminant or water vapor causes detriment to the health, safety or welfare of any person, or causes damage to property or business.

. . . .

Compare WAC 173-400-040(5).

"Air contaminant" is "dust, fumes, mist, smoke, other

FINAL FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND ORDER

1 particulate matter, vapor, gas, odorous substance, or any combination  
2 thereof." Section 1.07(b); RCW 70.94.030(1). Appellant's  
3 particulate matter is such an air contaminant. "Emission" is  
4 the "release into the outdoor atmosphere of air contaminants."  
5 Section 1.07(j); RCW 70.94.030(8). Air pollution is defined as:

6 . . . presence in the outdoor atmosphere of  
7 one or more air contaminants in sufficient quantities  
8 and of such characteristics and duration as is, or  
9 is likely to be, injurious to human health, plant or  
animal life, or property, or which unreasonably  
interfere with enjoyment of life and property. Section  
1.07(c). RCW 70.94.030(2).

10 Section 9.11(a) thus makes "air pollution" unlawful. Therefore,  
11 when dust or other particulate matter is present in the outdoor  
12 atmosphere in sufficient quantities and of such characteristics  
13 and duration as is, or is likely to be, injurious to human health,  
14 plant or animal life, or property, or which unreasonably interferes  
15 with enjoyment of life and property, Section 9.11(a) is violated.  
16 It matters not, for purposes of finding a violation under  
17 Section 9.11(a), that a polluter has taken all reasonable  
18 precautions to prevent material from becoming airborne. (See  
19 Section 9.15) Each section of the regulation must be complied  
20 with. See Sittner v. Seattle, 62 Wn.2d 834, 836 (1963).

21 Respondent must prove its case by a preponderance of the  
22 evidence. In weighing the evidence presented, we conclude that  
23 appellant caused or permitted the emission of particulate matter  
24 from its facility which was an unreasonable and substantial  
25 discomfort to the TOTE employees. Accordingly, we uphold the  
26 violations cited under Section 9.11(a) and the \$250 civil penalty

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1 assessed under Section 3.29 of Regulation I.

2 II

3 We notice the judgment of the Superior Court of Pierce County  
4 in Cause Numbers 251632 and 256239 which concludes that Sections  
5 9.03(b) and 9.15(a) of Regulation I are invalid and unenforceable  
6 because of the omission of the scienter requirement. In the  
7 instant matter however, we conclude that Section 9.11(a) is valid and  
8 enforceable despite the omission of scienter for the reasons  
9 stated in our decision in Kaiser Aluminum and Chemical Corp, et al.  
10 v. Puget Sound Air Pollution Control Agency, PCEB Nos. 1017, et al.

11 III

12 Any Finding of Fact which should be deemed a Conclusion of  
13 Law is hereby adopted as such.

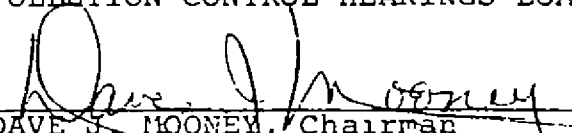
14 From these Conclusions the Board enters this

15 ORDER

16 The \$250 civil penalty is affirmed.

17 DATED this 9<sup>th</sup> day of August, 1978.

18 POLLUTION CONTROL HEARINGS BOARD

19   
20 DAVE S. MOONEY, Chairman

21   
22 CHRIS SMITH, Member

23   
24 DAVID AKANA, Member

25  
26  
27 FINAL FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND ORDER